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Workfare Wages Under the Fair Labor Standards Act

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NOTE

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INTRODUCTION

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[1] ("PRA") fundamentally changed public assistance. Most importantly, the PRA imposed mandatory work requirements upon welfare recipients.[2] Consequently, state legislatures designed legislation to comply with the PRA's novel requirements.[3] The PRA also replaced federal welfare entitlement spending.[4] Prior to the enactment of the PRA, states received money on par with the size of their welfare rolls.[5] The PRA allocates block grants to the states[6] and fixes these amounts at prescribed levels.[7] The states must maintain defined rates of work program participation among their welfare population to maintain federal funding levels for their public assistance programs.[8] Under the PRA, welfare recipients began, for the first time on a broad scale, working to receive their benefits.[9]

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1. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, 42 U.S.C.).

2. *See* 42 U.S.C. § 607 (Supp. II 1996).

3. *See id.* § 602(a). Some states have proposed or implemented experimental welfare plans pursuant to 42 U.S.C. § 1315 (1994). *See Recent Welfare Waiver Applications and Approvals*, 30 Clearinghouse Rev. 463-70 (1996) (listing approved state plans); *Recent Welfare Waiver Applications and Approvals*, 29 Clearinghouse Rev. 580-84 (1995) (same).

4. *See* 42 U.S.C. § 601(b) (Supp. II 1996).

5. *See* 42 U.S.C. § 603(a) (1994), *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112.

6. *See* 42 U.S.C. § 603(a)(1)(A) (Supp. II 1996).

7. The block grants of each state are determined through formulae that utilize prior fiscal spending. *See id.* § 603(a)(1)(B)(i)-(iii).

8. *See id.* § 607(b).

9. The work requirements are mandatory. *See id.* § 607. Everyone who receives welfare, over 10 million people at the time of passage, falls within the scope of the act. *See* Administration for Children and Families, *Aid to Families with Dependent Children Temporary Assistance for Needy Families 1960-1997* (last modified May 27, 1998) <http://www.acf.dhhs.gov/news/6097rf.htm> (listing the number of recipients of welfare in 1996). "Workfare" is not of recent vintage. The prior welfare law had created the job opportunities and basic skills training program, or "JOBS." *See* 42 U.S.C. § 602(a)(19) (1994), *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, § 103(a)(1), 110 Stat. 2105, 2112; *see also* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 Stan. L. & Pol'y Rev. 19, 20-25 (1998) (tracing the development of federal work requirements under the Family Support Act ("FSA"), the PRA's predecessor); Joel F. Handler, *"Ending Welfare as We Know It"—Wrong for Welfare, Wrong for Poverty*, 2 Geo. J. on Fighting Poverty 3, 17 (1994) (discussing the Work Incentives Program, the

Because they now must work to receive benefits, welfare recipients resemble state employees rather than wards of the state. The new emphasis on "earning" welfare has prompted discussions about whether the Fair Labor Standards Act of 1938[10] ("FLSA") applies to persons who work for their welfare benefits.[11] Specifically, the Department of Labor ("DOL") interpreted the FLSA in light of the PRA's work requirements to determine whether the minimum wage provisions of the FLSA apply to welfare workers.[12] The DOL has tentatively answered the question, "yes."[13] While this question is not

predecessor to JOBS). JOBS, created under the FSA, attempted to increase a recipient's incentive to work by increasing the amount that Aid to Families With Dependent Children ("AFDC") recipients could earn without losing benefits. *See* 42 U.S.C. § 602(a)(8)(A) (1994) (repealed 1996). This type of program, when implemented in the past, had caused little change in work levels among welfare recipients. *See* Mary Bryna Sanger, *Welfare Reform Within a Changing Context: Redefining the Terms of the Debate*, 23 Fordham Urb. L.J. 273, 294 n.128 (1996) (stating that during 1961-1973, AFDC-recipient participation in the work force fluctuated between 15% and 16%). Indeed, such measures may have increased the number of persons eligible for welfare. *See id.* at 294. The FSA had some work requirements but was constrained by the funding system. *See* Diller, *supra*, at 23. The PRA, on the other hand, is much more demanding of recipients than any of its predecessors. *See id.* at 31 (arguing that the PRA is intended to force people off of welfare).

10. Ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219).

11. *See* Alison Mitchell, *Clinton Urges Minimum Wage for Workfare*, N.Y. Times, July 29, 1997, at A16; Robert Pear, *Republican Leaders Exempt 'Workfare' From Labor Laws*, N.Y. Times, July 19, 1997, at A7; *see also* Richard L. Berke, *Gingrich Promises to Fight Clinton on Welfare Law*, N.Y. Times, Aug. 23, 1997, at A1 (stating that, despite recent political setbacks, Senator Gingrich intended to continue fighting against the minimum wage for workfare workers).

12. *See* Department of Labor, *Guidance: How Workplace Laws Apply to Welfare Recipients* (visited August 18, 1998) <http://gatekeeper.dol.gov/dol/asp/public/w2w/welfare.htm> ("Federal employment laws, such as the Fair Labor Standards Act . . . apply to welfare recipients as they apply to other workers."); Press Briefing by Mike McCurry, White House Office of Communications (May 16, 1997) [hereinafter Press Briefing] (anticipating that the DOL would determine that, as a matter of law, the FLSA applied to workfare participants), *available in* 1997 WL 276200. *But see* David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 Fordham Urb. L.J. 1, 25 n.163 (1997) ("Federal protections not applicable to welfare workers include federal wage and hour, unemployment compensation or workplace safety and health laws.").

13. *See* Department of Labor, *supra* note 12. *But see* Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995) (holding that work performed under Utah's workfare program is not "employment" within the meaning of the FLSA). The program evaluated by the *Johns* court, however, was established under the FSA, a predecessor to the PRA. *See id.* at 1544. The FSA was different because it provided incentives for training and education, while the PRA mandates work activities. *See* Diller, *supra* note 9, at 20-25; Lindsay Mara Schoen, Note, *Working Welfare Recipients: A Comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act*, 24 Fordham Urb. L.J. 635, 644-49 (1997). Participants in at least one federal workfare program, Welfare-to-Work, are covered by federal and state anti-discrimination laws. *See* 20 C.F.R. § 645.255(a) (1998) (stating that Welfare-to-Work participants shall have the same Federal discrimination in employment protections as other employees). Welfare-to-Work is a sub-program of Temporary Aid to Needy Families ("TANF") targeted at "hard-to-employ" individuals. *See id.* § 645.212. The Department of Agriculture ("USDA") also created a workfare program for food stamps, *see*

fully resolved, this Note assumes that workfare[14] participants are employees who are covered by the FLSA.[15] This answer, however, provokes further inquiry.

The FLSA requires that employers pay their employees the minimum wage.[16] Employers may pay wages in cash[17] or in the form of non-cash benefits,[18] also known as "in-kind benefits." In-kind benefits are services or goods that the employer provides to the employee,[19] such as food, housing, or other services.[20]

Welfare recipients who participate in workfare programs receive cash benefits and non-cash benefits.[21] Non-cash benefits include Tem-

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7 C.F.R. § 273.22 (1998), under which workfare participants are protected by the Federal or state minimum wage, whichever is higher. *See id.* § 273.22(e)(2). It is, however, optional for the states. *See id.* § 273.22. For a discussion of problems with food stamp workfare programs in light of the FLSA, see discussion *infra* Part III.B.1.

14. Workfare workers are persons who perform activities defined in 42 U.S.C. § 607(d)(1)-(12) (Supp. II 1996) in exchange for their welfare benefits.

15. Whether or not workfare participants are "employees" within the meaning of the FLSA is not settled, although the DOL, which is responsible for enforcing the FLSA, *see* 29 U.S.C. § 216(c) (1994), has stated that the FLSA applies to workfare programs. *See* Department of Labor, *supra* note 12 ("Federal employment laws, such as the Fair Labor Standards Act . . . apply to welfare recipients as they apply to other workers."); *see also* Jason DeParle, *White House Calls for Minimum Wage in Workfare Plan*, N.Y. Times, May 16, 1997, at A1 ("[T]he White House said today that most of the recipients being placed in work programs should be covered by minimum-wage laws."). The House Committee on Education and the Work Force and the House Committee on Ways and Means voted to exclude workfare workers from minimum wage coverage through federal budget legislation. *See* Robert Pear, *G.O.P. in House Moves to Bar Minimum Wage for Workfare*, N.Y. Times, June 12, 1997, at B16. Ultimately, the House's proposals were not included in 1998 legislation. *See* Peter T. Kilborn, *In Budget Bill, President Wins Welfare Battle*, N.Y. Times, Aug. 1, 1997, at A1.

Some states have attempted to address the issue of whether workfare participants are employees through legislation. For example, states may specify that workfare participants are not employees of the State or municipality in which they work. *See, e.g.*, Ark. Code Ann. § 21-5-604 (Michie 1996) (stating that workfare participants are not employees of the state, workfare does not create an employer-employee contract, and workfare participants may not receive workers' compensation); Ind. Code Ann. § 12-20-11-5(a) (Michie 1997) ("Work performed under this chapter is considered as satisfaction of a condition for poor relief and is not considered as services performed for remuneration or as repayment for poor relief assistance."); *see also* Costello v. Board of Review, Dep't of Labor, 642 A.2d 1034, 1036 (N.J. Super. Ct. App. Div. 1994) (holding that a workfare participant was not entitled to unemployment compensation). *But see* 7 U.S.C. § 2029(a)(1), (d)(2) (1994) (stating that food stamp workers must receive the same benefits as other workers performing the same work); Wis. Stat. Ann. 49.147(3) (West 1997) (granting a workfare participant workers' compensation rights).

16. *See* 29 U.S.C. § 206(a) (1994 & Supp. II 1996).

17. *See id.*

18. *See id.* § 203(m).

19. *See* 29 C.F.R. § 531.2 (1997).

20. *See* 29 U.S.C. § 203(m).

21. The exact benefits received depend on the jurisdiction and the circumstances of the recipient. *See* Staff of House Comm. on Ways and Means, 104th Cong., 2d Sess., 1996 Green Book: Background Material and Data on Programs Within the Jurisdic-

porary Aid to Needy Families ("TANF") and Food Stamps.[22] TANF[23] benefits are delivered in the form of cash, housing subsidies, child care, transportation, furniture, and other benefits.[24] Workfare requires that a welfare recipient perform "work activities" in exchange for or as a condition of receipt of TANF benefits.[25]

Generally, when a state's cash benefits are divided by the hours those workfare participants must engage in work activities, the result is less than the minimum wage.[26] States expose themselves to liability under the FLSA if they do not pay their employees the minimum wage.[27] Non-cash benefits may rectify the difference between cash benefits and the minimum wage.

This Note examines whether the non-cash benefits received by workfare participants may be considered "wages" within the meaning of the FLSA. Part I of this Note provides a history of the FLSA and

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tion of the Comm. on Ways and Means 384-85 (Comm. Print 1996); N.Y. Comp. Codes R. & Regs. tit. 18, § 352.2 (1997) (describing New York's benefits).

22. *See* 7 U.S.C. § 2011 (1994) (food stamps); 42 U.S.C. § 601 (Supp. II 1996) (TANF).

23. TANF replaced Aid to Families with Dependent Children ("AFDC"). *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112.

24. States have a free hand in doling benefits. *See* Staff of House Comm. on Ways and Means, *supra* note 21, at 384-85; 20 C.F.R. § 645.220(e) (authorizing states in Welfare-to-Work programs to give recipients transportation assistance, substance abuse treatment, child care, emergency housing, and "other supportive services"); *see also* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.2 (1997) (listing the same types of assistance that authorized by the federal Welfare-to-Work programs).

25. *See* 42 U.S.C. § 607(d)(1)-(12) (Supp. II 1996); 7 C.F.R. § 273.7 (1998) (describing the USDA's food stamp work requirements); *see also infra* note 190 (listing work activities). State workfare programs are called by various names. *See, e.g.*, Haw. Rev. Stat. § 346-29 (Michie Supp. 1997) (First to Work Program); Ind. Code Ann. § 12-20-11 (Michie 1997) (Workfare); Me. Rev. Stat. Ann. tit. 22, § 4316-A(2) (West 1997) (Municipal Work Program); Ohio Rev. Code Ann. § 5107-42 (Anderson Supp. 1997) (Works First); 62 Pa. Stat. Ann. tit. 62, § 405-1 (West 1996) (Road to Economic Self-Sufficiency Through Employment and Training); Wis. Stat. Ann. § 49.141 (West 1997) (Wisconsin Works); *see also* Staff of House Comm. on Ways and Means, *supra* note 21, at 404-08 (listing programs in states as of January 1994).

26. *Compare* 42 U.S.C. § 607(c)(1)(A) (setting the 1998 minimum average hours per week of work at 20), *with* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.2(d) (1997) (fixing monthly cash grant levels for one person at $112). Thus, the federal law requires 20 hours of work per week, while the state's benefits, in light of this 20-hour requirement, pay only $28 per week, or $1.40 per hour. If one includes New York's shelter allowance, *see id.* §§ 352.2(d), 352.3, and home energy payments, *see id.* § 352.2(d), then a worker's wage based on a twenty-hour workweek is $5.50 per hour, above the minimum wage. The minimum hours, however, will increase to 30 at year 2000, and remain at 30 every year thereafter. *See* 42 U.S.C. § 607(c)(1)(A) (Supp. II 1996). Based on a thirty-hour workweek, the worker's wage would be $3.70, assuming benefits remain constant. *Cf.* Diller, *supra* note 9, at 24 (stating that states may assign workfare workers to up to 40 hours of work per week, further depressing workfare wages).

27. *See* 29 U.S.C. §§ 215-216 (1994) (providing public and private rights of action for FLSA violations). *But see infra* note 29 (discussing the split of authority over whether the FLSA can be enforced against state governments by state courts).

examines the FLSA's wage regulation and the legal tests courts have applied to FLSA wage issues. Part I also discusses the FLSA exemptions created by Congress. Part II reviews the PRA and the requirements it places on states and workfare participants. Part III asks whether non-cash benefits are in-kind benefits that states may credit against the wages the states owe workfare workers. Part III concludes that states cannot receive credit for in-kind benefits. Part IV looks at one proposed solution, the creation of a workfare exemption, and examines several others.[28] This Note concludes that states must employ a combination of methods to satisfy their obligations under the FLSA and the PRA.[29]

I. THE FAIR LABOR STANDARDS ACT

Although sixty-two years separate the passage of the PRA and the FLSA, the PRA's work requirements raise labor questions with respect to the PRA's application within the rubric of the FLSA. This part discusses the history of the Fair Labor Standards Act. This part also explains non-cash wages and the development of exemptions from the FLSA.

28. From time to time, solutions have been discussed. *See* Press Briefing, *supra* note 12 ("It may be the case that some states are going to elect to cover some of their folks who are workfare participants under the trainee provision of the Fair Labor Standards Act."); *see also* Diller, *supra* note 9, at 27 & n.114 (observing that the DOL guidance leaves open the possibility that workfare programs may be structured to avoid paying workers the minimum cash wage). Food stamps may only be included, however, if the state participates in a special food stamp program administered by the USDA. *See* 7 U.S.C. § 2013 (1994); Department of Labor, *supra* note 12. The USDA's Guidance is appended at the end of the DOL's Guidance.

29. This Note's conclusions suggest that some workfare employees have claims against some states under the FLSA. *See* 29 U.S.C. § 215 (1994) (prohibiting violations of the FLSA); *id.* § 216(a)-(c) (providing for maximum six-month prison term and maximum $10,000 fine, and creating a civil right of action for back wages, attorneys fees, and liquidated damages equal to back wages). Federal courts may not, however, grant back wages and liquidated damages because of states' Eleventh Amendment immunity from private suits in federal courts. *See* U.S. Const. amend. XI; *see also* Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996) (holding that Congress may not abrogate the states' Eleventh Amendment immunity from suits of citizens pursuant to its Article I powers). In addition, state courts are split on whether state courts must enforce the FLSA. *Compare* Ahern v. State, 4 Wage & Hour Cas. 2d (BNA) 1342, 1344 (N.Y. App. Div. 1998) (holding that Eleventh Amendment immunity does not apply to states when private citizens sue the state in that state's courts under federal law), *with* Alden v. State, No. CUM-97-446, 1998 WL 439259, at *3 (Me. Aug. 4, 1998) (holding, by a vote of four to two, that Eleventh Amendment immunity protected the state from defending against an FLSA lawsuit in that state's courts). An alternative is to file suit under state law. *See* Enzian v. Wing, 670 N.Y.S.2d 283, 284-85 (App. Div. 1998) (mem.); Brukhman v. Giuliani, 662 N.Y.S.2d 914, 920 (Sup. Ct. 1997) (holding, on state law grounds, that welfare workers had to be paid the higher prevailing wage for work performed, not the minimum wage), *rev'd*, 1998 WL 635655, at *1 (N.Y. App. Div. Sept. 17, 1998) (mem.).

A. *The History of the FLSA*

The Great Depression spurred congressional efforts to create a national minimum wage.[30] This legislative impetus first manifested itself in the National Industrial Recovery Act of 1933 ("NIRA"),[31] which the Supreme Court promptly struck down.[32] Undaunted, President Roosevelt continued advocating for national wage standards.[33] The original FLSA bill, as introduced in Congress, was very different from the final law.[34] The original bill created a Fair Labor Standards Board that could raise or lower minimum wages and maximum hours within industries;[35] however, as the FLSA bill labored through Congress, it was amended several times, and the final version was much more rigid than the original.[36]

It appeared that the FLSA would suffer the same fate as the NIRA.[37] Fortuitously, one vote on the Court changed,[38] and the Court, in a prelude to later decisions,[39] upheld state minimum-wage legislation.[40] Subsequently, Congress passed the FLSA, and it became law on June 25, 1938.[41] The FLSA survived constitutional scrutiny.[42]

Congress intended the FLSA to protect low-end wage earners and to ensure that they possessed economic power and self-sufficiency by increasing employment opportunities and guaranteeing workers a

30. *See* William P. Quigley, *"A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage*, 27 St. Mary's L.J. 513, 517 (1996).

31. Ch. 90, 48 Stat. 195, 199 (1933), *amended by* Act of June 14, 1935, ch. 246, 49 Stat. 375, *terminated by* Exec. Order No. 7323, 3 C.F.R. 149 (1936-1938).

32. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935). Although the NIRA was struck because it was an unconstitutionally broad delegation of power to the Executive Branch, *see id.* at 537, the Court had consistently invalidated state minimum wage laws as well. *See infra* note 37.

33. *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 464, 466-74 (1939) (detailing the Congressional debate over the FLSA); Quigley, *supra* note 30, at 522.

34. *See* Forsythe, *supra* note 33, at 474.

35. *See id.* at 475.

36. *See id.* at 466-90.

37. *See, e.g.*, Morehead v. New York *ex. rel.* Tipaldo, 298 U.S. 587, 610-11 (1936) (invalidating New York's minimum wage laws because they violated the Due Process Clause of the Fourteenth Amendment, specifically a person's freedom to contract), *overruled in part by* Olsen v. Nebraska *ex rel.* Western Reference & Bond Assoc., 313 U.S. 236 (1941). *Olsen* reflects the Court's jurisprudential shift.

38. *See* Quigley, *supra* note 30, at 526-27. "Why Justice Roberts changed his vote, which apparently was cast, though not announced, before President Roosevelt publicly revealed his Court-packing plan, has been hotly debated since the day *Parrish* was decided." *Id.* at 527. *Parrish* was the landmark case in which the Supreme Court reversed itself on this issue. *See infra* notes 39-40 and accompanying text.

39. *See, e.g.*, United States v. Darby, 312 U.S. 100, 125 (1941) ("[I]t is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process . . . .").

40. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-98 (1937).

41. *See* Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 Lab. L.J. 715, 721 (1988).

42. *See Darby*, 312 U.S. at 125.

cash wage.[43] The FLSA created a national minimum wage[44] and an overtime wage.[45] The minimum wage is the minimum amount of money an employer must pay an employee per hour worked for the first forty hours of service in a seven-day period.[46] Employees who work more than forty hours in a seven-day period trigger the overtime provision of the FLSA. In such instances, employees are compensated at 150% of their regular wage for hours they work above forty within any seven-day period.[47] Congress implicitly sanctioned this forty-hour workweek by implementing a fifty percent wage increase penalty.[48]

The FLSA is a remedial law.[49] Congress, through its plenary power to regulate interstate commerce, intended this Act to correct the economic evils of the Great Depression.[50] The Act contains a statement of congressional findings:

> [T]he existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.[51]

Congress intended to strike at the "unequal bargaining power [that existed] between employer and employee."[52] Congress established a balance of power between the employer and the employee by protecting certain groups of the population, including women, children, and non-union workers,[53] from "substandard wages" and "excessive

43. *See generally* Quigley, *supra* note 30, at 529 (observing that the FLSA was intended to improve the living conditions of workers).

44. *See* 29 U.S.C. § 206(a)(1) (1994).

45. *See id.* § 207.

46. *See id.* § 206(a)(1).

47. *See id.* § 207(a)(1).

48. *See id.* The maximum hours provision was downwardly graduated: 1938, 44 hours; 1939, 42 hours; 1940, 40 hours. *See* Fair Labor Standards Act, ch. 676, § 7(a)(1)-(3), 52 Stat. 1060, 1063 (1938) (codified as amended at 29 U.S.C. § 207).

49. *See* A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

50. *See* Quigley, *supra* note 30, at 517.

51. 29 U.S.C. § 202(a) (1994).

52. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945); *see* Walling v. Peavy-Wilson Lumber Co., 49 F. Supp. 846, 861 (W.D. La. 1943) (noting that in certain situations the employer and employee are not on "equal contracting terms").

53. "To conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor." Statutory History of the United States: Labor

hours" that were dangerous to the national health and well-being.[54] Congress also sought to ensure employees a cash wage, believing that "the individual worker should have both the freedom and the responsibility to allocate his minimum wage among competing economic and personal interests."[55]

Although today cash wages are the norm, non-cash or "in-kind" wages were much more common earlier this century. At the turn of the century and for some time thereafter, businesses, typically in "factory towns" or "company stores," paid their workers in a variety of forms, including housing or coupons which could be redeemed in exchange for goods.[56] Alternatively, these employers deducted expenses such as board and lodging from their employees' wages.[57] These practices deprived the worker of a portion of his cash wage.[58] The FLSA laid down rules that regulated this deprivation.[59]

Congress also attempted to spread the economic benefits of employment as widely as possible.[60] By creating a fifty percent increase in a person's wage for hours worked above the maximum-hour ceiling,[61] Congress created an incentive for employers to reduce the number of hours that individuals worked over that ceiling. If current employees put in less time, then employers would be forced to hire more employees.[62] This, in turn, would reduce unemployment.[63]

Congress intended the FLSA's coverage to be very broad.[64] Initially, the FLSA covered over eleven million workers.[65] Although the creation of a living wage was perceived as quite an achievement, the percentage of workers covered was actually low.[66] Today, the FLSA covers over seventy million people, or 85.6% of America's workers.[67]

The fundamental protections provided by the FLSA have not changed since 1936, aside from periodic increases in the amount of the minimum wage.[68] Congress, however, has broadened the scope of the

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Organization 396-97 (Robert F. Koretz ed., 1970) (quoting President Roosevelt's special message to Congress, May 24, 1937).

54. *See Brooklyn Sav. Bank*, 324 U.S. at 706, 707 n.18.

55. Brennan v. Heard, 491 F.2d 1, 4 (5th Cir. 1974), *overruled on other grounds by* McLaughlin v. Richland Shoe Co., 486 U.S. 128, 134-35 (1988).

56. *See Peavy-Wilson*, 49 F. Supp. at 856-58.

57. *See id.*

58. *See id.*

59. *See infra* Part I.B (describing the regulation of non-cash wages by the FLSA).

60. *See* James Ledvinka, Federal Regulation of Personnel and Human Resource Management 249 (1982).

61. For overtime work, the law provides for a 50% increase in the employee's wage, not 150% of the minimum wage. *See* 29 U.S.C. § 207 (1994).

62. *See* Ledvinka, *supra* note 60, at 249.

63. *See id.*

64. *See* Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959).

65. *See* Quigley, *supra* note 30, at 530.

66. *See id.*

67. *See id.* at 535 n.104.

68. *See id.* at 544 n.141.

FLSA several times.[69] In 1974, Congress attempted to bring State and municipal employees within the scope of the FLSA.[70] The Supreme Court initially held that state employee coverage was unconstitutional,[71] but reversed itself within a decade.[72]

The FLSA contains three important provisions that affect an employee's right to a minimum cash wage. First, the FLSA authorizes the payment of non-cash wages,[73] which allows employers to pay a portion of their employees' minimum wage in the form of non-cash benefits.[74] Second, the FLSA provides for the payment of sub-minimum wages to trainees and learners.[75] Third, classes of employees are exempt from the minimum wage and overtime aegis of the FLSA.[76] The following sections discuss these provisions.

B. *Non-Cash Wages Under the FLSA*

Non-cash wages must fulfill three criteria to be counted toward the minimum wage. An employer may pay an employee non-cash wages only if the benefits are customarily furnished,[77] acceptance of these benefits by the employee is voluntary,[78] and the employer deducts from the employee's cash wage only the reasonable cost of providing the benefits, and not the market value of the benefits.[79]

The next section examines the legal tests that determine whether an employer may credit non-cash benefits against wages owed to employees. These tests ask several questions: whether the benefit is (1) customarily furnished, (2) credited at the reasonable cost or fair value to the employer, and (3) accepted voluntarily by the employee. This

69. *See, e.g.*, Fair Labor Standards Amendments of 1974, Pub. L. 93-259, § 23(a)(1), 88 Stat. 55, 69 (codified at 29 U.S.C. § 213) (repealing exemption of employees in motion picture theaters); *id.* § 12(a), 88 Stat. at 64 (codified at 29 U.S.C. §§ 207, 213) (repealing exemption of employees of institutions other than hospitals that cared for the sick); *id.* § 13(a), 88 Stat. at 64 (codified at 29 U.S.C. §§ 203, 207, 213) (amending exemptions related to hotel, motel, and restaurant employees).

70. *See id.* § 6(a), 88 Stat. at 58-60 (codified at 29 U.S.C. §§ 203, 204, 207, 208, 216).

71. *See* National League of Cities v. Usery, 426 U.S. 833, 847-52 (1976).

72. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545-47 (1985). The law was recast as the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (codified at 29 U.S.C. §§ 203, 207, 211).

73. *See infra* Part I.B.

74. *See* 29 U.S.C. § 203(m) (1994).

75. *See infra* Part I.C.

76. *See* 29 U.S.C. § 213(a) (exempting certain employees from minimum wage and maximum hour requirements); *id.* § 213(b) (exempting certain employees from maximum hour requirements only). For a discussion of these exemptions, see *infra* part I.C.

77. *See* 29 U.S.C. § 203(m).

78. *See* Williams v. Atlantic Coast Line R.R., 1 Wage & Hour Cas. (BNA) 289, 296 (E.D.N.C. 1940); 29 C.F.R. § 531.30 (1997) ("Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.").

79. *See* 29 C.F.R. § 531.3.

framework is the basis of this Note's analysis of welfare in-kind benefits, and answers the question of whether states may take credit for non-cash benefits.[80]

1. The Customarily Furnished Test

Department of Labor regulations state that in-kind benefits must be customarily furnished to count as wages.[81] The DOL has defined "customarily" to mean that "the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities."[82] An example of customarily furnished benefits that are wages under the FLSA is board and lodging.[83] This is a question of fact, and courts look to the particular circumstances of the case to decide the issue.

For example, the Ninth Circuit, in *Walling v. Alaska Pacific Consolidated Mining Co.*,[84] held that miners had to be paid an hourly wage as opposed to split-time wages for their first forty hours of work per week, and overtime for any time worked above forty hours.[85] The miners also received board and lodging.[86] The miners had specifically contracted to have board and lodging expenses deducted from their weekly earnings.[87] The Company argued that the workers could agree in contract—formed just prior to the initiation of the suit—to deduct the cost of board and lodging from overtime payments.[88] The court disagreed, finding that the cost of board and lodging must be included in the weekly rate of pay.[89] In reaching this conclusion, the court looked to how the Company had dealt with the miners in the past, according to employee tradition and industry custom.[90]

The legislative history of the FLSA suggests that employers had to provide services to receive the credit for in-kind benefits.[91] It did not matter whether the employee took full advantage of the benefits. The

80. *See infra* Part III.

81. *See* 29 C.F.R. § 531.30-.31.

82. *Id.* § 531.31; *see* Southern Pac. Co. v. Joint Council of Dining Car Employees, Locals 456 & 582, 165 F.2d 26, 31-32 (9th Cir. 1947); Walling v. Alaska Pac. Consol. Mining Co., 152 F.2d 812, 815 (9th Cir. 1945).

83. *See* 29 C.F.R. § 531.2(a).

84. 152 F.2d 812 (9th Cir. 1945).

85. *See id.* at 815. The Defendant devised split-time wages to evade paying more money in wages under the FLSA. Every eight-hour day was divided into six hours of regular wage work and two hours of overtime work, such that at the end of a seven-day period, the employer paid its employees exactly as much as it had prior to the passage of the FLSA. *See id.* at 813.

86. *See id.* at 813.

87. *See id.* at 814.

88. *See id.* at 815.

89. *See id.*

90. *See id.*

91. *See* S. Rep. No. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3015.

Senate recognized in a 1966 report that meals provided by a restaurant were "board" which was "customarily furnished" by the employer, regardless of whether the employees ate the meals.[92] The Northern District of Georgia, in *Melton v. Round Table Restaurants, Inc.*,[93] agreed. The court held that meals served to waitresses every work day at the same time constituted a "customary" benefit. The *Melton* court described the delivery of meals as "customary in the trade," and labeled the plaintiffs experts in the restaurant industry in terms of customs.[94] Additionally, inconsistent use of the benefit did not impact upon the validity of the credit. The "mere fact that some employees did not uniformly avail themselves of the meals constitutes no bar, any more than would the failure to use furnished lodging every single night . . . ."[95] Thus, according to the court, as long as the employer regularly furnishes the benefits to the employees, it can take credit for them.

Within the phrase "customarily furnished," "furnished" has a separate definition and distinct legal requirements. In order to be "furnished," the employee must receive the benefits of the facility.[96] The furnishings must be for the benefit of the employee.[97] The facilities may not be tokens, coupons, or things recognized as valuable only within the employer-employee relationship.[98] If the facilities are primarily for the benefit of the employer, no credit may be taken.[99]

In *Southern Pacific Co. v. Joint Council Dining Car Employees, Locals 456 & 582*,[100] the Ninth Circuit held that meals eaten by waiters

92. *Id.*, *reprinted in* 1966 U.S.C.C.A.N. 3002, 3015.
93. 20 Wage & Hour Cas. (BNA) 532, 534 (N.D. Ga. 1971).
94. *Id.*
95. *Id.*
96. *See* 29 C.F.R. § 531.30 (1997).
97. *See id.* § 531.31(d)(1).
98. *See id.* § 531.28.
99. *See* Shultz v. Bradley, 67 Labor Cas. (CCH) ¶ 32,650, at 45,248 (E.D. Va. 1972) (holding that employer receives no credit if in-kind wage is for convenience of employer). Wages are for the sole benefit of the employee, whether they are in-kind benefits or in cash. If an employer received wage credit for a service that benefited the employer, the exception would be turned on its head. For example, tools, safety caps, goggles, police protection, and insurance may not be credited because they are for the benefit of the employer. *See* 29 C.F.R. § 531.32(c). Although an employee derives some benefit from goggles and other safety measures, these are necessary because of dangers located in the work environment. In the same vein, insurance allows the employer to spread the costs of the business, and benefits the employer. Thus, the employer may not take a credit for insurance against the employees' minimum wage. The DOL interpretations cite the following examples of facilities that may be credited against wages: meals furnished at company restaurants or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); and fuel, electricity, water, and gas furnished for the noncommercial, personal use of the employee. *See* 29 C.F.R. § 531.33.
100. 165 F.2d 26, 32 (9th Cir. 1947).

aboard dining cars were "furnished" because they were primarily for the benefit of the waiters. The Railroad paid its waiters less than the minimum wage, and the parties stipulated that if the meals that the waiters ate were "wages," then the Railroad satisfied its FLSA minimum wage obligations.[101] The *Southern Pacific* court observed that the Railroad served meals for at least two reasons: first, as a matter of convenience for the Railroad, and second, as the price of employment.[102] The Railroad admitted that if it did not give waiters meals, it would seriously inconvenience train service to stop trains, let off the waiters, and pick them up after they had eaten.[103] Additionally, the court took judicial notice that the Railroad could require waiters to bring their own meals or make deductions for the meals they ate.[104] The court found important, however, the fact that the waiters ate their meals on their own time. The Railroad derived no benefit from this other than the benefit that the Railroad would expect from paying the waiters cash, namely, obtaining the desired service.[105] The court differentiated meals eaten on the waiters' time from providing "switching irons to switchmen or ticket punching tools to a conductor" because conductors and switchmen use those tools on the company's time.[106]

2. The Reasonable Cost Credit

In addition to being customarily furnished, non-cash benefits must be credited at their reasonable cost in order to qualify as wages under the FLSA.[107] The FLSA authorizes the Secretary of the Department of Labor to determine "reasonable cost" and "fair value."[108] Reasonable cost represents the cost of the benefit to the employer, and does not include "a profit to the employer."[109] Reasonable cost is another method of preventing the employer from profiting from in-kind benefits. Fair value is the reasonable cost other similarly situated employers paid for the benefits they provided their employees.[110] The employer is prohibited from receiving any direct benefit, but the fact that the employer may receive some incidental benefit from the payment of non-cash wages does not render these wages uncreditable.

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101. *See id.* at 27-28.
102. *See id.* at 29.
103. *See id.*
104. *See id.*
105. *See id.*
106. *Id.*
107. *See* 29 C.F.R. § 531.30 (1997).
108. *Id.* § 531.33.
109. Hodgson v. Frisch Dixie, Inc., 20 Wage & Hour Cas. (BNA) 167, 170-71 (W.D. Ky. 1971); *see* Dole v. Bishop, 740 F. Supp. 1221, 1227 (S.D. Miss. 1990) ("While [defendant] testified at trial that he sought to claim credit for half the retail price of the meals provided employees, he was unable to show that such an amount would constitute the reasonable cost of these meals to defendants.").
110. *See* 740 F. Supp. at 1227.

For example, the Eighth Circuit held that where four employees were given a $300 credit for living quarters, the primary beneficiaries were the employee-tenants, even though the company gained some incidental benefit from the fact that the employees lived at the place of business.[111] The rationale underlying the reasonable cost rule appears to be that the employer must be in the same position as if it had paid the wages in cash.

3. Voluntary Acceptance Requirement

Acceptance of any non-cash wages by employees must also be voluntary.[112] The few courts that have considered the meaning of "voluntary and uncoerced" have not agreed on one definition.[113] The divergence of opinions, however, has been recognized by courts on only a few occasions.[114] The majority[115] of courts have held that when employees know or reasonably should know they must accept in-kind benefits as part of their job, and they voluntarily and without coercion accept that job, then the regulatory and statutory requirements are satisfied.[116] On the other hand, the minority rule states that employees must be offered a choice between cash wages and the in-kind benefits.[117]

a. *Majority Rule*

While "few courts have had occasion to construe" the DOL regulations' "voluntary and uncoerced" language,[118] those that have done so generally refuse to construe "customarily furnished" to mean "voluntarily accepted" or freely chosen by employees.[119] Courts have held that when an employee accepts a job voluntarily and without coercion,

111. *See* Marshall v. Truman Arnold Distrib. Co., 640 F.2d 906, 909 (8th Cir. 1981) (explaining that the employer incidentally benefited from the prevention of vandalism to living quarters and workplace).

112. *See* 29 C.F.R. § 531.30 (1997).

113. *See infra* notes 121-45 and accompanying text.

114. *See* Lopez v. Rodriguez, 668 F.2d 1376 (D.C. Cir. 1981); Donovan v. Miller Properties, Inc., 547 F. Supp. 785 (M.D. La. 1982), *aff'd*, 711 F.2d 49, 50 (5th Cir. 1983); Davis Bros., Inc. v. Marshall, 522 F. Supp. 628 (N.D. Ga. 1981); Williams v. Atlantic Coast Line R.R., 1 Wage & Hour Cas. (BNA) 289 (E.D.N.C. 1940).

115. The word "majority" is used with some equivocation. Rulings on this issue are rare, and few courts have published opinions on the matter. *See Lopez*, 668 F.2d at 1379.

116. *See, e.g., id.* at 1380 (holding that "voluntary" may be inferred from job acceptance); Morrison, Inc. v. Marshall, 25 Wage & Hour Cas. (BNA) 122, 124 (S.D. Ala. 1981) (observing that the circumstances of employment may determine whether job acceptance was voluntary).

117. *See infra* notes 139-43 and accompanying text.

118. *Lopez*, 668 F.2d at 1379.

119. *See* Hodgson v. Frisch Dixie, Inc., 20 Wage & Hour Cas. (BNA) 167, 170-71 (W.D. Ky. 1971).

such acceptance automatically includes the in-kind benefits the employer may bestow upon the employed.[120]

Davis Bros., Inc. v. Donovan[121] exemplifies the majority rule. In *Davis Bros.*, the Eleventh Circuit held that "voluntary" does not require employee choice.[122] The court reasoned that acceptance of the benefit is a condition of employment, and if the employee entered into that agreement freely, then the benefit was accepted voluntarily.[123] The defendant had deducted the cost of meals it furnished to employees from the cash component of the minimum wage.[124] As a result, the employees' wages were reduced by twenty-five to thirty-five cents per hour, bringing their cash wage below the federal minimum.[125] In addition, the employer received the credit for the meal whether or not the employees ate the meals.[126] The Secretary of Labor argued that if the meal credit was mandatory, it could not have been voluntary.[127] The court disagreed with that position,[128] finding that the Secretary of Labor "has read into the statute a voluntary-choice-by-employee provision that Congress did not require."[129]

Similarly, the court, in *Tippie v. Affordable Inns, Inc.*,[130] implicitly held that an employer did not have to offer the employee a choice between lodging and cash.[131] Specifically, the court found that where the in-kind benefit is a necessary part of the employment agreement, acceptance is voluntary and uncoerced.[132] Thus, the court observed, employers did not have to offer employees a choice because the employees had already made that choice when they accepted the job:

> Where living in an apartment is an essential part of the contract of employment as a motel employee, and, but for the employee's willingness to agree thereto, employees would not have been hired, apartment allowance is a part of the employee's compensation for purposes of determining the rate of minimum and overtime to be paid.[133]

The court, therefore, inferred that employees made a "voluntary" choice through acceptance of the job.

120. *See Lopez*, 668 F.2d at 1380; Donovan v. Miller Properties, 547 F. Supp. 785, 789 (M.D. La. 1982), *aff'd*, 711 F.2d 49, 50 (5th Cir. 1983).
121. 700 F.2d 1368 (11th Cir. 1983).
122. *See id.* at 1372.
123. *See id.*
124. *See id.* at 1369.
125. *See id.* at 1369-70.
126. *See id.* at 1369.
127. *See id.* at 1370 (citing the DOL's interpretation of 29 C.F.R. § 531.30 (1981)).
128. *See id.* at 1369-73.
129. *Id.* at 1369.
130. 24 Wage & Hour Cas. (BNA) 975 (W.D. Okla. 1980).
131. *See id.* at 979-81.
132. *See id.* at 981.
133. *Id.*

The Court of Appeals of the District of Columbia applied the same concept in *Lopez v. Rodriguez*.[134] The employee had accepted a job as a housekeeper who performed numerous tasks.[135]

> [A]ppellants were concededly seeking to employ a "live-in" housekeeper and babysitter when they hired appellee. If appellee understood this when she accepted the job, and if her acceptance of the job was voluntary and uncoerced, then it is idle to inquire whether her *initial* acceptance of board and lodging was voluntary and uncoerced. Appellee had no choice but to accept the lawful "live-in" condition if she desired the job.[136]

The *Lopez* court recognized that this doctrine had its limits.[137] The court held that in the special case of housekeepers who depend on their employers for shelter, conditions could become so onerous such that the employee would not have accepted them when first offered the employment.[138]

b. *Minority View*

Some courts, in accordance with the minority view, have held that employers must offer employees a choice between cash and non-cash wages if employers intend to offer in-kind benefits at all. For example, in *Marshall v. New Floridian Hotel*,[139] the court held that the Hotel failed to offer its employees, whom it paid in cash wages and in non-cash wages, a choice between the cash and non-cash wages.[140] The Hotel had sheltered several employees on the premises, gave them meals, and deducted rent from their wages.[141] The court stated that the employer had a duty to provide its employees with an option to receive cash instead of food and lodging *prior to* the employees' acceptance of those benefits.[142] The court held that absent choice, "lodging or other facilities is not voluntary and uncoerced and thus

134. 668 F.2d 1376 (D.C. Cir. 1981).

135. *See id.* at 1378.

136. *Id.* at 1380.

137. Later in its opinion, the court equivocated: "[A]n employer may impose 'coercive' conditions—that is, conditions so onerous and restrictive that the employee's continued employment and acceptance of board and lodging ceases to be voluntary." *Id.*

138. *See id.*

139. Marshall v. New Floridian Hotel, 24 Wage & Hour Cas. (BNA) 530 (S.D. Fla. 1979), *aff'd on other grounds sub nom.* Donovan v. New Floridian Hotel, 676 F.2d 468, 473 (11th Cir. 1982) (declining to consider the District Court's finding that, as a matter of law, the defendant below should have offered its employees a choice between cash and non-cash wages).

140. *See id.* at 539.

141. *See id.* at 538-39.

142. *See id.*; *accord* Davis Bros., Inc. v. Marshall, 522 F. Supp. 628, 630-31 (N.D. Ga. 1981) ("By preventing employers from forcing employees to accept unwanted meals and lodging as part of their wages, the regulation serves this Congressional goal."), *rev'd*, 700 F.2d 1368, 1369 (11th Cir. 1983); Hodgson v. Frisch Dixie, Inc., 20 Wage & Hour Cas. (BNA) 167, 170-71 (W.D. Ky. 1971).

such may not be considered 'furnished' . . . as part of wages paid the employee . . . ."[143]

The court, in *Reich v. Giaimo*,[144] held that employees must specifically choose child care benefits if those benefits are to be counted against the employees' minimum wage. The court stated that "an employee's acceptance of [child care benefits] as part of his or her wages must be voluntary and uncoerced."[145] The *Giaimo* court did not give any reasons why childcare might be differentiated from other in-kind benefits such as food or lodging. Underlying the court's reasoning, however, may have been the notion that employers should not be in a position to compel employee acceptance of childcare, thereby reducing an employer's cash wage. This would give employers a device by which to reduce employees' cash wage whether or not employees benefit from the in-kind benefits.

c. *FLSA Exemptions*

Congress has created exemptions to the minimum wage and maximum hour provisions of the FLSA. These exemptions are grounded in policy concerns, which in some instances trump the FLSA's minimum wage requirements. This part explores those policies.

Many types of employees are exempt from the FLSA. Exemptions are defined by statute.[146] Employees may be exempt from the minimum wage law, the overtime law, or both.[147] The following employees are exempt from the minimum wage and overtime requirements of the Act: any person working in an executive, administrative, or professional capacity;[148] persons employed by an amusement or recreational establishment;[149] seamen;[150] farmers and agricultural labor, within certain limits;[151] non-American seamen;[152] certain newspaper employees;[153] domestic babysitters and domestic companionship providers;[154] certain criminal investigators;[155] and computer systems analysts, computer programmers, and computer engineers.[156] Other classes of employees are exempt only from the overtime requirements of the FLSA.[157] They include: employees of rail carriers, air carriers,

143. *New Floridian Hotel*, 24 Wage & Hour Cas. (BNA) at 539.
144. 1 Wage & Hour Cas. 2d (BNA) 1681 (E.D. Mo. 1994).
145. *Id.* at 1688.
146. *See* 29 U.S.C. §§ 213-214 (1994 & Supp. II 1996).
147. *See id.* § 214.
148. *See id.* § 213(a)(1).
149. *See id.* § 213(a)(3).
150. *See id.* § 213(a)(5).
151. *See id.* § 213(a)(6).
152. *See id.* § 213(a)(12).
153. *See id.* § 213(a)(8).
154. *See id.* § 213(a)(15).
155. *See id.* § 213(a)(16).
156. *See id.* § 213(a)(17).
157. *See id.* § 213(b).

outside purchasers of poultry, eggs, cream, or milk, seamen, some radio and television announcers and engineers, certain drivers, mechanics, and salesmen.[158] Congress has considered making workfare participants exempt from the FLSA,[159] and a majority vote in Congress may overturn DOL interpretations.

Policy concerns underlie Congress's exemption choices.[160] For example, there are instances when federal regulation is inappropriate, redundant, or interferes too greatly in the customs and practices between employers and employees.[161] Congress also intended to leave local commerce, such as agriculture and town stores,[162] under the control of the states.[163] Congress articulated exemptions for employees who were regulated by other laws.[164] Finally, the FLSA and DOL regulations make exceptions to the minimum wage for full-time students in retail or agriculture, student learners, apprentices, learners, messengers, student workers, workers with disabilities, and homeworkers.[165]

Full-time students working in certain industries may be paid less than the minimum wage.[166] Students may be paid eighty-five percent of the minimum wage if they meet certain conditions.[167] Employment must be "necessary in order to prevent curtailment of opportunities for employment;" employment of students cannot create a substantial probability of reducing the opportunities for full-time employment for other persons; no abnormal labor conditions, such as a strike or lockout may exist; other wage rates are not reduced; and the employer must not have any serious outstanding DOL violations on record.[168] The FLSA also makes provision for "student-learners" to be paid no less than seventy-five percent of the minimum wage.[169] Student-learn-

158. *See* 29 U.S.C. § 213(b) (1994).

159. While this suggests that welfare workers are covered, there is much disagreement on this point. *See supra* note 13.

160. Congress created exemptions where Federal regulation was impractical, redundant, or deemed unnecessary for reasons grounded in public policy. *See supra* note 163. *But see* Quigley, *supra* note 30, at 531-33 (arguing that exclusions were politically motivated to exclude women and southern African-Americans).

161. *See* Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48-49 (1943).

162. *See* Roland Elec. Co. v. Walling, 326 U.S. 657, 669 (1946).

163. *See* Homemakers, Home & Health Care Servs., Inc. v. Carden, 538 F.2d 98, 102 (6th Cir. 1976).

164. *See Southland Gasoline*, 319 U.S. at 48-49; Boutell v. Walling, 148 F.2d 329 (6th Cir. 1945), *aff'd*, 327 U.S. 463 (1946). For example, the Interstate Commerce Commission regulated the hours of truckers, who were otherwise covered by the plain language of the FLSA. *See Boutell*, 327 U.S. at 467 (discussing the regulatory relationship between the FLSA and the Interstate Commerce Commission).

165. *See* 29 U.S.C. § 214 (1994). A "learner," differentiated from a student, is a person who is being trained for an occupation not "customarily recognized as an apprenticeable trade." 29 C.F.R. § 520.300a (1998).

166. *See* 29 U.S.C. § 214(b).

167. *See* 29 C.F.R. § 519.1-.2 (1997).

168. *See id.* § 519.5.

169. *See* 29 U.S.C. § 214(a); 29 C.F.R. § 520.506 (1998).

ers are students "receiving instruction in an accredited school, college or university and who [are] employed on a part-time basis, pursuant to a bona fide vocational training program."[170] This exemption is similar to the one for full-time students. The exemption may be granted only when it is necessary to prevent the curtailment of employment opportunities,[171] and student-learners may not displace full-time employees.[172] Apprentices and learners are subject, in relevant part, to the same regulatory terms as student-learners: they may not displace other workers or depress wages, and they may only work if necessary to prevent the curtailment of employment opportunities.[173]

The FLSA formed the basis of wage protection in the United States, and the minimum wage has been the tool of wage protection since 1938.[174] The FLSA broke new ground at the time, and established a floor below which no employer could pay a wage earner, regardless of the bargaining positions of the parties. Policy and practical considerations, however, persuaded Congress to not extend protection to all workers, and therefore Congress exempted certain classes of employees from coverage.[175] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 embraces different values that, at certain crossroads of policy and practice, conflict with the FLSA.[176] The next part examines the PRA and its differing values.

II. THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996

Riding the crest of a popular wave that demanded welfare reform,[177] President Clinton in 1994 promised to reform welfare.[178] Congress passed the PRA,[179] which eviscerated the federal government's general assistance program, Aid to Families with Dependent Children ("AFDC"), and fundamentally changed modern public assistance.

The PRA eliminated the thirty-year-old AFDC program[180] and abolished welfare entitlement spending.[181] The PRA replaced the en-

170. 29 C.F.R. § 520.201(c).

171. *See* 29 C.F.R. § 520.3(a) (1997).

172. *See id.* § 520.5(g). There are other requirements specific to the training program. *See id.* § 520.5.

173. *See* 29 C.F.R. § 520.201(d) (1998) (apprentices); *id.* § 520.201(b) (learners).

174. *See generally* Quigley, *supra* note 30, at 519-29 (discussing the history of the Act's passage and some of its rhetoric).

175. *See* 29 U.S.C. § 213 (1994).

176. *See* Diller, *supra* note 9, at 27.

177. *See* Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. Times, July 15, 1994, at A1.

178. *See id.*

179. *See supra* note 1.

180. *See* 42 U.S.C. § 601 (1994) (repealed 1996).

181. *See* 42 U.S.C. § 601(b) (Supp. II 1996). The number of persons on welfare has decreased by 31% nationally in the last two years. *See* Barbara Vobejda, *States to Get*

titlement spending with block grants, which were based on state and federal spending levels of prior years.[182] The Act also imposed work requirements on welfare recipients, set a five-year, non-continuous time limit on the receipt of funds by any person, and prescribed minimum rates of participation by one and two-parent families.[183]

The work requirements of the PRA are mandatory.[184] Persons who fail to comply with them face a pro-rata cut in benefits[185] and may risk losing cash assistance,[186] food stamps,[187] and housing subsidies.[188] States have discretionary power to impose harsher sanctions upon recipients who fail to meet the work requirements.[189]

The PRA lists twelve acceptable work activities.[190] These activities include subsidized work, unsubsidized work, vocational training, em-

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$1 Billion Bonus for Welfare Reform, Washington Post, Feb. 17, 1998, at A5; Administration for Children and Families, *supra* note 9 (listing the number of welfare recipients in the relevant time period).

182. *See* 42 U.S.C. § 603 (Supp. II 1996).

183. *See id.* § 608(a)(7)(A).

184. *See id.* § 607(a).

185. *See id.* § 607(e)(1)(A).

186. *See id.* § 607(e)(1)(B). Persons on welfare receive at least a portion of their welfare grant in cash. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 352.2(a) (1997) (describing cash benefits); *id.* § 352.2(d) (1996) (listing cash benefit levels).

187. In an optional workfare program within the USDA, welfare recipients may lose their food stamps through sanctions for noncompliance. *See* 7 U.S.C. § 2029(f) (Supp. II 1996). Generally, when states calculate the credit they receive for the work programs, they include Food Stamps in this calculation. *See, e.g.*, Me. Rev. Stat. Ann. tit. 22, § 4316-A(2) (West 1997) (stating that welfare workers must be paid the minimum wage in net benefits); N.Y. Soc. Serv. Law § 336 (McKinney Supp. 1998) (including food stamps in the calculation of the workfare minimum wage). In addition, if a person fails to comply with the work requirements, they may lose their Food Stamps as well as their cash assistance. *See* 42 U.S.C. § 607(e).

188. Some states, including New York, give welfare recipients part of their grant in the form of a shelter allowance, which is generally a payment sent directly to the recipient's landlord to be credited against the recipient's rent. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.3(a) (1996).

189. *See* 42 U.S.C. § 607(e)(1)(A)-(B) (providing that, for noncompliance, states must either terminate assistance or reduce the amount of assistance "payable to the family pro rata (or more, at the option of the State)"). Some states terminate assistance until the recipient complies. *See* Fla. Stat. Ann. § 414.065(4) (West 1998). A recent New York proposal represents the farthest reaches of this discretionary power. Taking sanctions to their most extreme conclusions, New York's Governor George Pataki has suggested that if parents fail to comply with the work requirements, then the entire family's cash benefits would be terminated over a three-month period. *See* Raymond Hernandez, *Pataki Urges New Sanctions for Workfare*, N.Y. Times, Mar. 4, 1998, at B1. New York sanctions the parent for the first failure or refusal to comply. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 1300.12(d)(1) (1998).

190. *See* 42 U.S.C. § 607(d). Specifically, work activities are:

(1) unsubsidized employment;
(2) subsidized private sector employment;
(3) subsidized public sector employment;
(4) work experience . . . if sufficient private sector employment is not available;
(5) on-the-job training;
(6) job search and job readiness assistance;

ployment experience, and community service.[191] The first twenty hours worked during any week must fall into nine of the twelve listed activities.[192] The PRA does not require payment of the minimum wage for work activities.[193] Nonetheless, most states mandate that workfare workers be paid the minimum wage.[194] In addition, as a general rule, states cap the maximum hours a welfare recipient may be required to work at forty, mooting any application of the overtime provisions of the FLSA to workers.[195]

The PRA sets forth minimum levels of participation that states must maintain among their welfare populations.[196] Otherwise, states risk losing a fraction of their funding for noncompliance.[197] The PRA creates two classifications of recipients: single-parent families and two-parent families.[198] Further, the PRA sets forth the minimum number of hours that members of each class must work per week, and it requires that a percentage of class members must comply with the minimum hours requirement.[199] Among all families receiving aid under the PRA, 25% must participate in work activities in 1997.[200] The minimum participation rate increases by 5% every year until 2002;[201] by

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(7) community service programs;
(8) vocational educational training [12-month maximum];
(9) job skills training directly related to employment;
(10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;
(11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence . . . ; and
(12) provision of child care services to an individual who is participating in community service program.

Id. § 607(d)(1)-(12).

191. *See id.*

192. *See id.* § 607(c)(1)(A). For two-parent families, the requirement is 35 hours. *See id.* § 607(c)(1)(B).

193. The Family Support Act, however, had this requirement. *See* 42 U.S.C. § 682(f)(B)(i) (1994) (repealed 1996).

194. *See* Fla. Stat. Ann. § 414.065(1)(b) (West 1998) (guaranteeing workfare workers the minimum wage); 305 Ill. Comp. Stat. Ann. 5/6-1.7 (West 1998) (same); Ind. Code Ann. § 12-20-11-1(c) (Michie 1997) (same); N.Y. Soc. Serv. Law § 336-c(2)(b) (McKinney Supp. 1998) (same). These statutes do not moot the minimum wage issue because they calculate all benefits, not just cash assistance. *See* Ind. Code § 12-20-11-1; N.Y. Soc. Serv. Law § 336-c(2)(b). Other states consider cash benefits only. *See* Fla. Laws Stat. Ann. § 414.065; Pa. Stat. Ann. tit. 62, § 405.2(b) (West 1997). Although state minimum wage laws provide some protection for welfare workers, because states do not provide all of their benefits in cash it is unclear if compliance with state law is equivalent to compliance with the FLSA.

195. *See, e.g.*, Fla. Stat. Ann. § 414.065(2) (West 1998) (limiting hours per week to 40 under all circumstances).

196. *See* 42 U.S.C. § 607(a)(1)-(2) (Supp. II 1996).

197. *See id.* § 609(a)(3)(A).

198. *See id.* § 607(a)(1) (one-parent families); *id.* § 607(a)(2) (two-parent families).

199. *See id.* § 607(a), (c)(1)(A).

200. *See id.* § 607(a)(1).

201. *See id.*

that time, 50% of all families receiving aid must be engaged in work activities.[202] Among two-parent families, 75% must participate in work activities in 1997 and 1998, and 90% must participate in 1999 and every year thereafter.[203] In order to be counted under the mandatory minimum participation rates, a single parent must work an average of twenty hours per week in 1997 and 1998, twenty-five hours per week in 1999, and thirty hours per week thereafter.[204] Adults in families with disabled parents or "severely disabled" children must work a total of thirty-five hours per week; otherwise, the parents must work a total of fifty-five hours per week.[205]

The PRA fundamentally changed the way the states administered welfare.[206] The PRA mandates that states move a percentage of their welfare recipients into work activities.[207] It also sets time limits on the assistance an individual might receive, and mandates sanctions for those who do not comply with their work requirements.[208] While "work activities" include vocational training and education, the first twenty hours of work per week must be work experience, community service, or public or private employment.[209]

Although workfare has existed in different forms for decades, the mandatory work requirements of the PRA created a new atmosphere, if not a new hostility, towards welfare.[210] Legally, the changes raise questions about the relationship between welfare law, work requirements, and the strong American tradition of worker protection. The PRA forces welfare recipients into the workforce. The next section will examine what happens when workfare collides with the minimum wage.

III. APPLICATION OF THE IN-KIND BENEFITS TEST TO WORKFARE PARTICIPANTS

States have developed a variety of means of delivering welfare benefits to their citizens.[211] This section outlines the benefits welfare recipients generally receive and applies the in-kind benefits tests outlined in part I to welfare benefits. It concludes that welfare benefits are not in-kind benefits that may be counted as wages.

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202. *See id.*
203. *See id.* § 607(a)(2).
204. *See id.* § 607(c)(1)(A).
205. *See id.* § 607(c)(1)(B).
206. Many states had already enacted laws similar to the PRA pursuant to the waiver provisions of 42 U.S.C. § 1315 (providing the Secretary of Health and Human Services with the power to waive certain federal requirements in favor of state experimental plans).
207. *See* 42 U.S.C. § 608(a)(7)(A).
208. *See id.* § 607(e); *supra* note 183 and accompanying text.
209. *See supra* note 192 and accompanying text.
210. *See* Diller, *supra* note 9, at 20.
211. *See supra* note 24.

The following example illustrates how the wage credit operates in the private sector and workfare. If a person works forty hours per week at the rate of $5.15 per hour,[212] he earns $206.[213] Assume, though, that the employer provides the employee with one widget per week that, although not cash, is fungible and benefits the employee. Assume further that, although the market value of widgets is high, $60 per unit, the employer specializes in producing widgets, and can produce a high volume of widgets at low cost. Thus, the employer spends only $1 to make every widget that she is giving to the employees. The employer may credit the cost of providing the widget against the employees' wages, paying her only $205. Note, however, that only payment below the statutory minimum wage triggers the in-kind benefits requirement.[214] Suppose the employer in the example above paid her employees $10 per hour, and deducted the $60 market value of the widget from the employee's paycheck. This practice does not trigger the statute because the employee's hourly wage is not less than the minimum wage.[215]

Now assume that the employee is a welfare recipient who works twenty hours every week in a work experience program. The employee must receive $103 per week in cash (twenty hours per week at the minimum wage rate). If the employee's cash grant for that week is less than $103, then the state is paying the employee in this example less than the federal minimum wage and has violated the FLSA.[216]

Many states are underpaying their workfare workers by more than fifty percent. For example, a single person without children in New York receives $112 of public assistance every month.[217] New York's welfare laws require that such person work at least twenty hours per week during 1998.[218] At $28 per week, the worker's wage is less than $2 per hour. The state must cure the defect by either reducing the number of hours the employee works, which would preclude that person from being counted as a participant in a work program under the PRA,[219] increase cash assistance, or consider non-cash benefits as part of that employee's wages.

While cash benefits are rarely sufficient to fulfill the state's obligation to pay workers the minimum wage,[220] the sum total of a recipi-

212. *See* 29 U.S.C. § 206 (1994 & Supp. II 1996).

213. These examples exclude any taxes, which the employer must pay on the employee's behalf. *See* 29 C.F.R. § 531.38 (1997).

214. *See id.* § 531.28.

215. *See id.*

216. *See supra* note 192 (discussing how many states mandate that workfare workers be paid either the Federal or state minimum wage).

217. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.2, schedule SA-2a (1996).

218. *See* N.Y. Soc. Serv. Law § 335-b(2) (McKinney Supp. 1998).

219. *See supra* note 183.

220. The average monthly benefit in the states in 1995 was $377. *See* Staff of House Comm. on Ways and Means, *supra* note 21, at 386-87 tbl. 8-1.

ent's benefits package may result in a wage which is equal to or greater than the minimum wage. For example, utilizing the same welfare recipient from the above example, if New York included food stamps, the shelter allowance, and home energy supplement payments, a worker would earn over $5.15 per hour based on a twenty-hour workweek.[221] The Department of Labor, however, has set down regulations regarding what in-kind benefits are and when they may be credited against a person's wage.[222] In addition, case law has further refined and, at times, muddled the definition.[223]

In order to determine whether employers may use non-cash benefits to count toward their minimum wage payments in the context of welfare, these benefits must be analyzed under formulae pronounced by the DOL and applied by the courts. The next section performs this analysis. First, the section describes non-cash benefits workfare recipients usually receive. Second, the section asks whether the in-kind benefits satisfy all of the requirements of the FLSA. The section concludes that welfare benefits do not satisfy all of the requirements of the FLSA, and that states generally may not credit non-cash benefits against the cash wages states owe workfare workers.

A. *What Are Non-Cash Welfare Benefits?*

As discussed in part I, non-cash benefits that off-set cash wages must be customarily furnished, the off-set must be the reasonable cost of the benefit to the employer, and the benefits must be received voluntarily and in an uncoerced manner.[224] Benefits provided in the context of workfare include food stamps,[225] childcare,[226] transportation,[227] and housing subsidies.[228]

Food stamps are coupons that the state gives to persons who exchange them for food at participating stores.[229] Food stamp budgets are determined based upon a family's size, income, and expenses, such as rent, heat, and school tuition.[230] New York includes the amount of food stamps a person receives in calculating the maximum hours that

221. *See supra* note 26.
222. *See* 29 C.F.R. § 531.27, .29 (1997).
223. *See supra* Part I.B.1.
224. *See supra* Part I.B.
225. *See* Staff of House Comm. on Ways and Means, *supra* note 21, at 856 tbl.16-3.
226. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 1300.4(a)(1)(ii) (1998); *cf.* 42 U.S.C. § 607(e)(2) (Supp. II 1996) (stating that no state may reduce or terminate the benefits of a person without childcare for a child under six years of age who refuses to work).
227. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 1300.4(b)(1) (1998).
228. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.3 (1997).
229. *See* 7 U.S.C. § 2012 (1994). For example, a person who receives $60 worth of food stamps may purchase $60 worth of food. *See id.* § 2013.
230. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 387.9-10 (1996 & 1998) (listing factors).

recipients may work.[231] Also, persons receiving only food stamps must participate in work activities.[232] Families receive food stamps that bear dollar amounts. For example, a person who receives sixty dollars of food stamps may purchase sixty dollars worth of food. The dollar amount is counted as part of a worker's benefit, and, if the worker is covered under the FLSA, is credited against wages.

The state must provide other benefits for workfare participants. One such benefit is childcare.[233] Parents must conduct a reasonable search for childcare for children under six, and the state must provide such childcare if the parents are unable to find it.[234] For example, in Alaska, workfare workers do not have to participate in the program if the state does not pay for their childcare.[235] Workfare workers also have the right to transportation to and from their work sites.[236] For example, in New York, workers receive two tokens per day to commute by subway or bus.[237] Finally, housing subsidies are a substantial portion of benefits. These are payments that pay for rent.[238] Some states "direct vendor," or send to the landlord, part of the recipients' welfare grant in the form of a housing subsidy.[239]

B. *Are States Entitled to Credit In-Kind Workfare Benefits Against the FLSA Minimum Wage?*

To qualify as wages under the FLSA, in-kind benefits must be (1) customarily furnished, (2) set-off at the reasonable cost to the employer, and (3) voluntarily accepted without coercion.[240] No cases have addressed these standards in the context of workfare benefits, but litigation on the basis of minimum wage violations has been suggested.[241] In addition, the DOL and Department of Agriculture ("USDA") have attempted to provide some administrative guidance

231. *See* N.Y. Soc. Serv. Law § 336-c(2)(b) (McKinney Supp. 1998).

232. *See id.*

233. *Cf.* 42 U.S.C. § 607(e)(2) (Supp. II 1996) (creating an exception to termination if a parent does not have childcare for a child under six years of age).

234. *Cf. id.* (creating an exception to termination if a parent does not have childcare for a child under six years of age).

235. *See* Alaska Stat. § 47.27.035(d)(1) (Michie 1996); N.Y. Comp. Codes R. & Regs. tit. 12, § 1300.4(b)(2) (1998) (mandating that New York pay up to $200 in childcare if the primary caregiver is the workfare worker).

236. *See, e.g.*, N.Y. Soc. Serv. Law § 332(2) (McKinney Supp. 1998) ("A local services official shall: (a) make diligent efforts to assist a person who needs transportation to get to and from a work activity site in obtaining such transportation. . . .").

237. *See id.*

238. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.3 (1997).

239. *See* 45 C.F.R. § 234.60 (1997) (setting forth the requirements that states must meet if they choose to make direct-vendor or two-party payments of benefits); N.Y. Comp. Codes R. & Regs. tit. 18, § 352.3.

240. *See supra* notes 81-145 and accompanying text.

241. *See* Mary R. Mannix et al., *Welfare Litigation Developments Since the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 31 Clearinghouse Rev. 435, 444 (1998).

on this issue.[242] This part first looks at the DOL and USDA Guidances, and then analyzes in-kind benefits under each element of the test outlined above.[243]

1. The DOL Guidance, the USDA Guidance, and State Laws that Count Food Stamps as In-Kind Benefits

As a preliminary matter, the DOL has stated that the FLSA applies to welfare workers.[244] The DOL also briefly addressed food stamps and other in-kind benefits, and stated, without much discussion or any analysis, that "food stamp benefits . . . may contribute towards meeting minimum wage requirements for TANF recipients in work activities."[245] The guidance further muddied murky waters by additionally stating "a participant who is employed by the state may receive food stamps as compensation for certain hours and receive welfare benefits as compensation for other hours of employment."[246] For the most part, states can only meet minimum wage requirements by combining food stamp benefits with TANF benefits. If food stamp benefits and other welfare benefits may only count toward separate work hours, then the states are still not paying their workers enough money. Regarding other benefits, the DOL iterated the elements of in-kind benefits[247] and concluded without analysis that "[b]ecause these criteria are quite strict, it is likely that these benefits will not count as wages in most circumstances."[248]

Trailing on the coattails of the DOL guidance, the USDA declared that states can combine food stamp benefits and TANF grants.[249] Like the DOL's guidance, the USDA's guidance states this but does not analyze food stamps. Indeed, because interpretation and enforcement of the FLSA falls under the DOL rather than the USDA,[250] the USDA's guidance reaches, at best, as far as the DOL statement, which fails to analyze food stamps under the in-kind benefits test. Neither the DOL or the USDA have taken the analytical steps necessary to determine whether food stamps are in-kind benefits. Therefore, although the DOL and USDA may have "solved" the problems this Note discusses, the guidances are the beginning of the analysis, not the end.

Likewise, state laws that merely assert that food stamps qualify as wages are insufficient as well. Although several states have passed laws that mandate that welfare workers must receive the minimum

242. *See* Department of Labor, *supra* note 12.
243. *See supra* Part I.B.
244. *See* Department of Labor, *supra* note 12.
245. *Id.*
246. *Id.*
247. These elements are discussed fully in *supra* part I.B.
248. Department of Labor, *supra* note 12.
249. *See id.*
250. *See id.*

wage,[251] these laws often include food stamps in the minimum wage calculation.[252] This is problematic because these laws assume that in-kind food stamp benefits count in the minimum-wage calculation, just like the USDA's guidance did. This works if the FLSA does not apply to workfare workers or, if it applies, then only if food stamp benefits satisfy the "in-kind" benefits test. Indeed, if workfare workers are covered, then, at the very least, the DOL or the states must at least analyze whether food stamps are in-kind benefits that may off-set the minimum wage.[253] This Note undertakes that analysis in the following sections and concludes that food stamps and other benefits do not meet FLSA criteria for in-kind wages.

2. The In-Kind Benefits Test in the Context of Workfare

This section conducts a careful analysis of whether in-kind benefits are wages under the FLSA. The analysis fills the gap left by the DOL, USDA, and state law in this area.

a. The Customarily Furnished Test

The first element of the test of whether in-kind benefits constitute wages under the FLSA is whether the benefits are "customarily furnished." The DOL has articulated that if the employer has regularly provided the benefit, or if other similar employers have regularly provided it in similar situations, then the benefit is customary.[254] No court has analyzed workfare benefits under this formula.

One approach for states to consider is to examine the activity that workfare participants are doing and the customs of that job or industry to determine whether the benefits they are receiving are customary. States could compare the benefits that the workfare worker received with those of a person who engages in that work outside of the context of welfare. For example, if a welfare worker cleaned a city's streets, the comparison would be to a sanitation worker who did the same work. If a welfare worker performed clerical work in a government office, then the comparison would be to clerical workers. The court should ask what benefits the private or public worker in the equivalent job receives.

This is problematic, however, because most workfare jobs do not traditionally or regularly confer in-kind benefits on employees. In-

251. *See supra* note 187 and accompanying text.

252. *See supra* note 187 and accompanying text.

253. The DOL has stated in its guidance that food stamps count, but did so without engaging in an in-kinds benefits analysis. *See* Department of Labor, *supra* note 12. Regarding benefits other than food stamps, the guidance merely states that, "[b]ecause the[minimum wage requirements] are quite strict, it is likely that these benefits will not count as wages in most circumstances." *Id.* Finally, the guidance is for "general information" only and does not have the effect of law. *Id.*

254. *See* 29 C.F.R. § 531.30 (1997).

deed, work activity assignments tend to be to the Sanitation or Parks Departments.[255] Not only do these jobs generally fail to provide housing (such as a motor lodge, inn, or housekeeping position might) or food (such as a restaurant might), but whatever the employer customarily provides the worker, such as tools or protective clothing, is for the benefit of the employer.[256] Thus, these workfare workers do not engage in the types of work that usually promise in-kind benefits.[257]

An additional problem with this approach is that an analysis based on the customs and practices of specific industries and jobs may be unfair and offend equal protection principles. The guiding principle of welfare payments is a person's needs and resources.[258] A person's resources determine eligibility, and the number of persons in a recipient's family determines the level of benefits.[259] If the form of the benefits could be modified based on the type of workfare job assigned by the state to a person, then public assistance recipients who are similarly situated might be treated differently.[260]

The fundamental difference between welfare benefits and benefits that are customary is that there is no employee participation in the creation of the customs of reimbursement. For example, in the restaurant and classical railroad industries, employees and employers had informal and formal agreements about in-kind benefits.[261] Welfare recipients, on the other hand, have no such input. States may fashion relief in any form they see fit.[262] At the same time, welfare recipients are not in a position to bargain.[263] Therefore, benefits are not issued according to any custom, but are instead granted at the pleasure of the state. Accordingly, states should not receive credit for those benefits.

A second approach to determining what benefits are customary is to consider welfare itself as an industry or entity from which one may

255. *See* Diller, *supra* note 9, at 30-31; Gregory, *supra* note 12, at 14-15.

256. *See supra* note 99. Tools make employees more efficient. Safety equipment protects employees, which in turn protects employers from liability. Thus, such items are not for the benefit of the employee, but rather for the employer. *See* Southern Pac. Co. v. Joint Council of Dining Car Employees, Locals 456 & 582, 165 F.2d 26, 29 (9th Cir. 1947) (stating that items used on the company's time are for the benefit of the company).

257. *See* Diller, *supra* note 9, at 20 ("[W]ork programs are deliberately structured so that they are virtually never comparable to holding an actual job.").

258. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 351.2 (1998).

259. *See id.*

260. *Compare* N.Y. Comp. Codes R. & Regs. tit. 18, § 351.2 (1998) (basing eligibility and benefits levels on household resources), *with* N.Y. Comp. Codes R. & Regs. tit. 12, § 1300.6(a) (1998) (stating that the state must consider a person's skills, preferences, and work experience in job placement).

261. *See supra* notes 87-88 and accompanying text (describing the in-kind benefits arrangement as part of the employer-employee contract); *supra* notes 104-05 (discussing the contract agreement porters arranged with railroad management concerning meals).

262. *See supra* note 21.

263. *See* Handler, *supra* note 9, at 7.

divine customs. This approach posits that the states' and federal government's administration of public assistance has developed its own customs by which to judge workfare. There are identifiable trends and developments in welfare law. For many years, AFDC tied the reception of some benefits to other activities such as education or work.[264] Further, under one program, some welfare recipients were required to conduct job searches and register with their state for employment.[265] But this requirement was not enforced, and usually the "job search" ended with the registration.[266] Over time, additional and more stringent requirements appeared.[267]

Each new welfare law development, however, was the product of legislation, not the creation of customs to meet new situations.[268] If welfare administrators developed customs outside of the authorization of the relevant empowering legislation, then they would be acting beyond the scope of their power. In addition, the customs are being developed in the context of workfare. Workfare employees hold their jobs so they may learn job skills and be trained.[269] The beneficiary of the relationship is the worker, not the employer. The employer is also supervising the workfare employees much more than its regular employees. The customs arise out of a compelled legal relationship, not out of a contractual relationship.[270] Thus, a court would not be able to look to welfare for customs.

Further, the conditions imposed by the PRA are new to the welfare state. The novel custom of exchanging benefits for work may not have been in existence long enough to be regularly provided.[271] Also, although the PRA sets goals for participation, not all welfare recipients are being required to work.[272] Welfare recipients do not have the same relationship with the states that employees have had with their employers, thus making an analogy between the two very difficult.

Not only must in-kind benefits be customary in order to qualify as wages under the FLSA, but they must also be "furnished." In order for these benefits to be "furnished," they must be for the primary ben-

264. *See* Diller, *supra* note 9, at 20-23.

265. *See* Sanger, *supra* note 9, at 279.

266. *See generally* Diller, supra note 9, at 20-23 (discussing the limitations of earlier workfare programs).

267. *See id.* (tracking the history of workfare).

268. *See generally* 42 U.S.C. §§ 601-619 (Supp. II 1996) (directing use of Federal block grants).

269. *See* Gail P. Dave et al., *Welfare Reform*, 16 Yale L. & Pol'y Rev. 221, 262 (1997).

270. *But cf. supra* notes 87-88, 104-05, and text accompanying note 261 (discussing how employees traditionally had some input in compensation and benefits).

271. *Cf.* Melton v. Round Table Restaurants, 20 Wage & Hour Cas. (BNA) 532, 534 (N.D. Ga. 1971) (discussing custom of providing meals as the standard for the industry).

272. *See* 42 U.S.C. § 607(e)(2) (detailing workfare exceptions).

efit of the employee, and not the employer.[273] In the workfare context, the employer is the state, and it is the state that may not directly benefit from the acceptance of the benefits.

Recipients do enjoy the benefits of welfare. They purchase food with food stamps. Should they receive child care, they can work while a provider cares for young children. Housing subsidies are sent to their landlords, and in return workfare workers have a place to live. Thus, with the arguable exception of child care, workfare workers are the primary beneficiaries of in-kind benefits. The state, on the other hand, may receive the benefit of the work performed by welfare workers. For example, a state benefits from welfare workers who clean parks in work experience programs because the state receives cleaner parks. Nevertheless, because the primary purpose of work experience programs is to train welfare workers to perform employment-related tasks,[274] cleaner parks may be an "incidental benefit" from the work program.[275] Therefore, workfare benefits may be considered "furnished" under the FLSA.

b. *The Reasonable Cost Credit*

Even if workfare in-kind benefits are "customarily furnished," thereby satisfying the first element of the test, states may only credit the reasonable cost or fair value of the benefits against the minimum wage.[276] The credit the state takes in these cases is generally the bottom line value of the benefit to the welfare recipient.[277] For example, if a person receives $60 in food stamps, the stamps have a value of $60 to the recipient, and the state credits $60 against the cash wage it pays the workfare worker. Clearly, the state does not profit from this relationship; the employee spends the food stamps at a store, which is not owned by the government. Likewise, the state does not profit when it subsidizes rent, transportation, or other costs.

The credit must be the reasonable cost. Here, the government is not the direct provider of benefits, but it uses proxies to provide bene-

273. *See supra* Part I.B.1.

274. *See* New York State Department of Labor, Notification of Work Required and Right to Contest (computer-generated form) (on file with the *Fordham Law Review*) (stating, to a work program participant, that "[a]s a person required to participate in work activities, you are expected to meet one or more . . . [work] requirements. The purpose of these requirements is to assist you in finding and keeping a job so that you will no longer be in need of public assistance."). *But cf.* Diller, *supra* note 9, at 24 (arguing that states no longer must justify work programs on the basis of promoting employability).

275. *See* Marshall v. Truman Arnold Distrib. Co., 640 F.2d 906, 909 (8th Cir. 1981); *supra* note 111 and accompanying text.

276. *See supra* Part I.B.2.

277. *Cf. supra* note 109 and accompanying text (discussing the wage credit that private employers may take).

fits.[278] If the government provided the benefits directly, it would not be able to reap a profit in terms of the credit it could take. Likewise, where the government uses proxies to provide in-kind benefits, it is not making a profit. Therefore, a credit matching what the government spends would be reasonable.

c. *Voluntary Acceptance*

Finally, even if in-kind benefits are "customarily furnished" and are credited at their reasonable cost or fair value, the benefits cannot be wages under the FLSA unless employees accept them voluntarily.[279] As discussed earlier, courts have not agreed on how to interpret this requirement.[280] The majority rule states that if a person chooses a job knowing that some wages will be paid through benefits, then this choice is considered voluntary.[281] The minority view states that employees who may receive in-kind benefits must have the choice between those benefits and the cash.[282] Thus, either employees must be given the choice to receive their wages in cash, or employees must freely choose their job with notice.

Under the majority's analysis, welfare benefits may be voluntary and uncoerced.[283] As a preliminary matter, persons who receive welfare are presumed to be capable of participating in work activities.[284] To receive welfare, a person must apply for it.[285] Thereafter, the person must be approved,[286] at which time the state will set benefit levels.[287] At some point in this process, a social services caseworker will likely explains to the potential recipient the form that their benefits will take.[288] Those who apply for welfare know or have constructive notice that the state may determine the means by which it delivers benefits.[289] Therefore, the acceptance of these benefits is arguably voluntary and uncoerced because recipients have the choice of receiving welfare, and implicitly consenting to the in-kind benefits, or choosing not to receive welfare.

278. As discussed earlier, *see supra* Part II, the federal government gives the states block grants, thus the states are proxies for the federal government. Because I assume that the state is the employer, however, the proxies are the government agencies or the private employers for whom welfare workers toil.

279. *See supra* Part I.B.

280. *See supra* Part I.B.

281. *See supra* Part I.B.3.

282. *See supra* Part I.B.3.

283. *See supra* Part I.B.3.

284. *See* N.Y. Soc. Serv. Law § 332.1 (McKinney Supp. 1998).

285. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 350 (1998) (application process).

286. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 351.8 (1996) (eligibility decision).

287. *See generally, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 352 (1997) (benefit types and levels).

288. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 351.1(b) (1998).

289. *See id.*

On the other hand, such applications may not be voluntary and uncoerced. Recall *Lopez*[290] where the court held that although a live-in worker may have voluntarily and without coercion accepted the position, the situation may have become coercive over time.[291] Implicit in the court's holding is that where a person accepts a job that provides in-kind benefits in the form of food and housing, he or she may become dependent on the food and housing to the degree that they must withstand any new conditions or burdens placed upon them by the employer because they have no choice.[292] On this point, the D.C. Circuit remanded the issue for further fact-finding by the lower court.[293]

Along the same lines, a person who applies for welfare may not have a choice because she does not have enough money to pay the rent or buy food. Welfare usually forestalls hunger and eviction. Once a person's application is approved, and she starts receiving benefits, she is in the same position as the live-in household worker in *Lopez*.[294] She is dependent on the state for essential goods and services such as food and housing, and she must bear whatever conditions the provider may impose upon her. In the case of a person on welfare, the fact that she will lose her benefits, and consequently her housing, may be coercive. Therefore, it is not at all clear that the government "furnishes" workers their benefits involuntarily and without coercion.

Employees, under the minority rule, must have a choice to accept in-kind benefits.[295] The state, however, gives workfare benefits on a take-it-or-leave-it system.[296] Although persons may choose which benefits to accept and which to decline, the government never gives a person the choice between cash and food stamps or other non-cash benefits.[297] In fact, the state exercises a great degree of control over the benefits it administers. A welfare recipient may never see her housing subsidies; payments are sent to the landlord directly if the recipient has at some time failed to apply her shelter allowances to the rent.[298] Food stamps restrict the places where persons may buy food because not all stores accept food stamps. Similarly, not all doctors accept Medicaid. These benefits are not fungible, and they are used to obtain designated services rather than purchase freely-chosen goods

290. Lopez v. Rodriguez, 668 F.2d 1376 (D.C. Cir. 1981).

291. *See id.* at 1380.

292. *See supra* notes 137-38 and accompanying text.

293. *See supra* note 136.

294. *See supra* note 136.

295. *See supra* Part I.B.3.

296. *Cf.* N.Y. Comp. Codes R. & Regs. tit. 18, §§ 350-352 (1996, 1997, & 1998) (providing for application and acceptance process).

297. *See* Patricia Collins Murdoch & Deborah Lee Stein, *Protecting the Safety Net: Food Stamp Benefits and the Waiver Process*, 30 Clearinghouse Rev. 367, 384-85 (1996) (discussing the optional cash for food stamps program).

298. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 381.3(d) (1998).

and services. Therefore, under the minority rule, benefits would not be voluntary and uncoerced.

The measures of the PRA are unprecedented. Likewise, its passage created unprecedented problems. Congress, whether through oversight or intent, did not provide for wage protection for welfare workers. States have attempted to fill the gap by guaranteeing welfare workers the minimum wage.[299] Yet cash benefits alone are usually not sufficient to guarantee that welfare workers receive the minimum wage. Further, as the above analysis illustrates, it is highly unlikely that workfare's non-cash benefits can qualify as wages under the FLSA, because they do not appear to satisfy all of the prongs of the FLSA's in-kind benefits test. States, therefore, must re-work their benefits programs to avoid liability in FLSA actions. Part IV discusses the ways states can change their welfare programs to comply with the FLSA.

IV. RECOMMENDATIONS

Congress, through the FLSA, developed an intricate web of laws and regulations that guarantee a minimum standard of income for working people. The PRA, the legislative fruit of a younger tree, redefined welfare by attaching work requirements to welfare payments.[300] Consequently, the PRA and the FLSA collided.

As discussed above, courts have developed ways of analyzing FLSA issues that suggest that states are not currently complying with the FLSA in administering their workfare programs.[301] Nevertheless, workfare is the square peg that courts must insert into the judicial round hole. Particularly in light of the differences in FLSA interpretation expressed in the federal courts,[302] workfare-FLSA litigation will tread an uncertain path.

There are several ways for states to cure the defects in their welfare programs. First, states may petition Congress to revitalize the recent GOP initiative to exempt workfare employees from federal employment law coverage. Secondly, states may attempt to tailor their welfare programs to meet the trainee exceptions of the FLSA. Third, states may attempt to meet their minimum wage obligations by restructuring in-kind benefits. The following sections discuses these recommendations.

A. *Create an Exemption*

Although Congress implicitly accepted the DOL's determination that federal wage and employment laws apply to workfare employees,

299. *See supra* note 194.
300. *See* 42 U.S.C. § 607 (Supp. II 1996).
301. *See supra* Part III.B.
302. *See supra* Part I.B.3.

governors had expressed much concern that their states would not be able to bear the expense of paying workfare workers the minimum wage.[303] The governors were strong supporters of the Republican attempt to exempt workfare workers from the FLSA's minimum wage requirement.[304]

Nothing rules out another attempt. Republican leaders promised that the compromise that swept a workfare exemption off of the table would be replaced with another one.[305] The FLSA is based upon policy considerations and measured judgments.[306] As stated above, the policy supporting the minimum wage and mandatory overtime laws is strong but not paramount.[307] Politicians may now decide that the nation's needs are best served by exempting workfare from the FLSA.

FLSA exemptions, however, have been criticized as discriminatory in the past.[308] Workfare participants have low levels of education, and, for example, in cities, tend to be minorities.[309] A congressional exemption for the FLSA may be subject to criticism on the same grounds. In addition, an exemption would cover millions of people, based on the number of persons who receive welfare. Exempting as many as eight million people who have no other federal wage protection seems to defeat the purposes of the FLSA.[310] In addition, this creates a pool of sub-minimum wage labor that can compete with higher-paid wage earners.[311] Nevertheless, Congress is free to exempt workfare participants from FLSA coverage, which would alleviate the conflict between the FLSA and the PRA.

B. *States Should Certify Welfare Workers as Sub-minimum Wage Students and Apprentices*

This Note has discussed the ways in which the PRA and FLSA conflict with one another and press contrasting policy choices. Work-

303. *See* Robert Pear, *G.O.P. in House Moves to Bar Minimum Wage for Workfare*, N.Y. Times, June 12, 1997, at B16.

304. *See* Robert Pear, *Republican Leaders Exempt 'Workfare' From Labor Laws*, N.Y. Times, July 19, 1997, at A7.

305. *See* Richard L. Berke, *Gingrich Promises to Fight Clinton on Welfare Law*, N.Y. Times, Aug. 23, 1997, at A1.

306. *See supra* Part I.

307. *See supra* Part I.C.

308. *See supra* note 160.

309. *See* Jason DeParle, *Shrinking Welfare Rolls Leave Record High Share of Minorities*, N.Y. Times, July 27, 1998, at A1.

310. *See* Administration for Children and Families, *supra* note 9 (stating that approximately eight million people receive welfare); *supra* Part I (discussing the goals of the FLSA).

311. *Cf.* Brukhman v. Giuliani, 662 N.Y.S.2d 914, 920 (Sup. Ct. 1997) (holding, on state law grounds, that welfare workers had to be paid the higher prevailing wage for work performed, not the minimum wage), *rev'd*, 1998 WL 635655, at *1 (N.Y. App. Div. Sept. 17, 1998) (mem.); Enzian v. Wing, 670 N.Y.S.2d 283, 284-85 (App. Div. 1998) (mem.) (citing the New York Supreme Court's ruling in *Brukhman* prior to its reversal).

training and vocational education count towards work activities.[312] The FLSA's reduced-minimum wage training exception is an area where the FLSA and PRA complement one another.

States could create job-training programs or place workfare recipients into such programs. First, the lower minimum wage requirement would give the states more breathing room to meet the federal wage standard. Second, as a matter of policy, many workfare workers are undertrained for private-sector jobs and require training.[313] The training would better prepare them for the jobs they must accept. Third, training can be an excellent transition from idleness to productivity.

Specifically, the FLSA contains minimum-wage exceptions for student learners and apprentices.[314] Two acceptable work activities under the PRA are on-the-job training and vocational educational training.[315] States could place workfare workers in job training or education settings that meet the FLSA's requirements and fulfill the state's obligations under the PRA. This solution, however, requires the employer to meet certain conditions,[316] and any expenses associated with meeting these conditions may off-set the minimum-wage savings. Additionally, people cannot train or attend vocational school indefinitely. Finally, these exceptions merely lower the minimum wage requirement by 15-25%; states would still have to pay 75-85% of the minimum wage.[317] Thus, this solution has its limitations.

Here, Congress's policy choices meet, albeit at an unlikely place. On the one hand, an earlier Congress guaranteed workers a cash wage. Today's Congress reflects changing attitudes and norms about welfare by mandating work activities in exchange for benefits. This elevated the state's expectations of welfare recipients, but it concomitantly triggered the greater protections the state affords working people. States should utilize this opportunity to harmonize federal welfare and labor law regulation.

C. *Restructure In-Kind Benefits to Meet FLSA Criteria*

The DOL has suggested that states could tailor food stamp programs to meet the DOL's in-kind benefits test.[318] Indeed, the USDA issued a guidance at the same time as the DOL's guidance that touted the USDA's food-stamp workfare program as the solution to the minimum wage problem.[319] This is significant because, for the most part,

312. *See supra* note 190 and accompanying text.
313. *See supra* note 309.
314. *See supra* note 165 and accompanying text.
315. *See supra* note 190.
316. For these conditions, see *supra* notes 165-73 and accompanying text.
317. *See supra* note 169 and accompanying text.
318. *See* Department of Labor, *supra* note 12; Diller, *supra* note 9, at 27 n.114.
319. *See* Department of Labor, *supra* note 12.

the two largest components of a welfare recipient's benefits package are cash benefits and food stamps.[320] In fact, most of the households that received AFDC in 1995 also received Food Stamps.[321]

One way in which states could satisfy the DOL's in-kind benefits test would be follow the DOL suggestion that states utilize the USDA's Food Stamp Workfare program.[322] The USDA's program is a workfare program similar to the PRA,[323] which mandates that persons who receive food stamps have the value of those food stamps count as wages, or that employers receive the value of food stamps in cash, which the employers must pay to the welfare workers.[324] USDA's program potentially solves the workfare wages dilemma, because the hours that workfare workers toil count for the PRA and USDA workfare requirements.[325] As discussed above, however, the statements of the DOL and USDA in this regard are merely conclusory, and food stamps as currently constituted do not meet the FLSA criteria for in-kind wages.[326]

States could circumvent the problem by converting food stamp benefits into cash.[327] Statutes authorize states to devise alternative plans that cash-out food stamp benefits, and states have attempted this.[328] Although cashing-out food stamps has been criticized because it potentially diverts money that would have been spent on food to other expenditures, it solves part of the FLSA dilemma. The welfare worker looks more like an employee, and the cash option puts the welfare worker in the same position as other employees. Indeed, cashing-out food stamp benefits gives welfare recipients the independence and ability to make their own economic choices.[329]

320. *See* Staff of House Comm. on Ways and Means, *supra* note 21, at 437-38.

321. *See id.* at 856 tbl.16-3.

322. *See* 7 U.S.C. § 2029 (1994); Department of Labor, *supra* note 12.

323. *See* Department of Labor, *supra* note 12.

324. *See id.*

325. *See id.*

326. *See supra* Part III.

327. *See* Murdoch & Stein, *supra* note 297, at 384.

328. *See id.*

329. Rent subsidies also may fit into the circular in-kind benefits hole. *See supra* note 245. The subsidies are like food stamp coupons: recipients can shop wherever they want, within limits. These limits are at times illegally low. *See* Jiggetts v. Dowling, 609 N.Y.S.2d 222 (App. Div. 1994) (affirming preliminary injunction ordering Commissioner of Social Services to pay rent arrears to welfare recipient's landlord because the shelter allowances were inadequate). In this case, recipients may use their subsidies to live in their particular apartment. Recipients choose where to live, and the government sends the rent directly to the landlord. Direct-vendor payments are made when the agency that administers benefits determines that the recipient is not sufficiently responsible to handle the money. *See supra* 239. The DOL guidance, however, only references cash benefits. *See* Department of Labor, *supra* note 12. The Guidance does not discuss in-kind benefits. Thus, states should convert all of their benefits to cash.

CONCLUSION

For good or ill, welfare has changed. Persons who do not work for their benefits do not receive them. This policy choice has collided with another policy choice: persons who work must be paid according to the standards defined by the FLSA. Workfare is, however, sufficiently different from ordinary work such that analysis of workfare is difficult under existing law. Thus, courts may make their own, new law, or states may attempt to modify their welfare programs to conform to the requirements of the FLSA. Either way, important questions remain to be answered.

Before those answers arrive, however, the states must distribute welfare benefits in an environment that is regulated by the PRA and FLSA. Although much of this Note discusses how these Acts are different, there is overlap, such as the sub-minimum wage training provisions.[330] Until Congress formulates a policy that unifies the goals of the PRA and the FLSA, states must use this overlap to serve the interests of welfare recipients while remaining true to federal regulations.

330. Additionally, states always have the option, however distasteful, of increasing cash benefits.